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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: August 11, 2008 Time: 10:00 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

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I. INTRODUCTION

Defendants CITY OF SAN DIEGO ("City"), the City's DEVELOPMENT SERVICES DEPARTMENT ("DSD"), KELLY BROUGHTON ("Broughton") and AFSANEH AHMADI ("Ahmadi") (collectively "City Defendants") hereby submit their reply to the opposition of Plaintiff BLACKWATER LODGE AND TRAINING CENTER'S *dba* BLACKWATER WORLDWIDE ("Blackwater") to the City's instant motion to dismiss.

Blackwater suggests this is a simple case. The City agrees. Indeed, the City simply seeks to have greater scrutiny of Blackwater's use of the property at issue, which Blackwater clearly seeks to avoid. Instead, Blackwater contends because it obtained approval of a few discrete building permit applications, without full disclosure of its intended change in use of the subject facility that had been used as a warehouse, it further obtained an unqualified right to be issued a certificate of occupancy for the entire structure. For purposes of obtaining a temporary restraining order and preliminary injunction, Blackwater asserted that without the certificate of occupancy it would suffer irreparable harm because it would not be able to perform a contract with the United States Navy. As this Court is aware, an initial determination, but not a determination on the merits, justified the issuance of a preliminary injunction. [1]

The City's motion seeks to challenge the legal sufficiency of the causes of action asserted in Blackwater's complaint. Such motion proceeds under different standards than for a request for injunctive relief. Blackwater's redundant references to the City's failure to raise various arguments at prior injunctive proceedings does not preclude nor waive the City's ability to do so here and is made without reference to any cogent legal authority. Blackwater's opposition also accuses the City of ignoring the legal requirements of a 12(b)(6) motion by resorting to "facts" not contained in the underlying complaint, despite its own reliance on "facts" that were presented by means of a judicial notice request. The City has done likewise, which is not improper.

[1] The purpose of a preliminary injunction is merely to preserve the *status quo*. A preliminary injunction is not a preliminary adjudication of the merits. *See, e.g., Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F2d 1415, 1423 (9th Cir. 1984). Findings of fact and conclusions of law made in connection with the preliminary injunction are not binding adjudications. *Horphag Research Ltd. v. Garcia*, 475 F3d 1029, 1035 (9th Cir. 2007).

Blackwater's opposition is the proverbial "pot calling the kettle black," which is representative of its position in this litigation. Blackwater insists upon its land use "rights" while seeking to ignore, if not avoid, the City's exercise of its authority to review land use activities within the City. Nonetheless, the City has raised legitimate legal grounds upon which to challenge Blackwater's complaint, and upon those grounds, request that Blackwater's complaint and every claim for relief therein, be dismissed.

II. LEGAL ARGUMENT

A. THE CITY'S RULE 12 (b)(6) MOTION IS PROPER

1. Blackwater Does Not Have an Unqualified Vested Right to a Certificate of Occupancy

Blackwater insists that the City is not entitled to any discretionary review of Blackwater's intended change of use of the subject facility, which was, and largely remains, a warehouse. Blackwater suggests the City cannot justify the right to do so under the San Diego Municipal Code ("SDMC"). However, the City clearly asserted that SDMC § 112.0103 provides that when an applicant applies for more than one permit or other approval for a single development, the "applications **shall be consolidated for processing** and shall be reviewed by a single decision maker," further providing that action shall be taken by the highest level of authority for that development. (Bolded emphasis added). On the other hand, relying on *Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588[2] and *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49, Blackwater argues that under state law the City had a mandatory duty to issue the certificate of occupancy, thereby precluding any decision by the City to subject the entirety of the project to a discretionary review process. Blackwater has overlooked, or failed to cite, state authority that holds to the contrary.

Specifically, in *Autopsy/Post Services, Inc. v. City of Los Angeles* (2005) 129 Cal.App.4th 521, the Court held that the city's grant of a building permit, and the owner's reliance on it, did not create a fundamental vested right to use the building in question for performing autopsies, where the owner's permit applications did not adequately reveal the proposed use. *Id.* at 525. In

[2] Blackwater incorrectly cited this case as 108 Cal.App.4th 558.

the *Autopsy/Post* case, the plaintiff ("APS") purchased a commercially zoned building for the purpose of operating a private medical laboratory specializing in autopsy and tissue procurement. *Id.* at 523. Six months after granting APS a permit to convert the premises to a medical laboratory, the City of Los Angeles issued a stop work order, and eventually revoked the permit, on the ground that APS had not obtained the required clearance from the city's planning department. *Id.* Following appeals to the city's planning commission and its city council, APS' application was denied on the basis that the proposed autopsy facility was equivalent to use as a morgue or mortuary, which was restricted to industrial zones within the city and not a commercial zone. *Id.* In addition, APS' claim it had a vested right to proceed with and to be granted a certificate for the autopsy facility rejected. *Id.*

Following a writ of mandate decided in the city's favor, the trial court determined APS had no vested right to the building permit because it did not act in good faith because it failed to disclose during the permit application process its intention to perform autopsies at the site. *Id.* The court of appeal affirmed, concluding the trial court correctly determined no vested right existed. *Id.* In so holding, the *Autopsy/Post* Court rejected APS' contention that the trial court erred when it refused to order the city to reinstate APS' building permit and to issue a certificate of occupancy. *Id.* at 526. APS also claimed – not unlike Blackwater in this case –the evidence showed that the city knew the full nature of APS' proposed use when it issued the building permits. *Id.*

The *Autopsy/Post* Court stated in pertinent part:

> If the City's grant of APS's permit and if APS's reliance on it created a fundamental vested right, the subsequent permit revocation would be subjected to judicial review under the independent judgment test. [Citation] However, the City's grant of the permit and APS's reliance on it did not create a fundamental vested right because, as the trial court found, APS did not act in good faith in applying for the permit or relying on it. [Citation] Moreover, the court exercised its independent judgment and weighed the evidence in ruling that APS did not act in good faith, and therefore had no vested right to the permit.

Id. at 526. APS insisted it had a vested right to use the property at least as a medical laboratory, since the relevant city department issued the permit for that use. *Id.* at 529. However, the

Autopsy/Post Court noted that none of the city entities which ordinarily conducted discretionary land use reviews had any opportunity to consider the use APS proposed, preventing the court's consideration of any determinations they may have made. *Id.* Accordingly, the Court stated that "[w]e assume that, if APS applies for and receives ... approval for the change of use to a medical laboratory rather than an autopsy facility, [the city] will promptly reinstate or reissue the permit, since revocation of the permit was based solely on the lack of Specific Plan approval." *Id.*

The parallels of the *Autopsy/Post* case and the case at bar are noteworthy. Like the *Autopsy/Post* plaintiff, Blackwater claims it acquired a vested right to a certificate of occupancy. Like the *Autopsy/Post* plaintiff, Blackwater contended that the City knew that it would be conducting training for military personnel and the facility would make use of an indoor firing range. Like the *Autopsy/Post* plaintiff, Blackwater did not provide transparent disclosure of its intended use of the warehouse when it applied for its building permits in a piece-meal manner. Ironically, just as Blackwater contends that its actions in the aggregate entitle it to a certificate of occupancy, it disputes the City's right to consider the building permits in the aggregate, to determine if the proposed use of the warehouse as a military training facility is appropriate in the Otay Mesa Planned Development District ("OMDD").

Likewise, the *Inland Empire* and *Thompson* cases are distinguishable, since those cases did not have facts similar to the case at bar. Indeed, the *Inland Empire* case does not involve a land use issue and a municipality is not a party. Although the *Thompson* case was a building permit and certificate of occupancy case, the court did not determine that there was an unqualified right to a certificate of occupancy once building permits were issued. Instead, the Thompson court stated:

> The issuance of building permits ... is a discretionary function. The permit process not only provides a means of ensuring that structures meet health, safety, and other requirements, it also subserves the public policies or goals of general land use planning. ... [A] building official has no mandatory duty to issue any particular building permit at all, even if a proposed application and plan meet all existing code and regulatory requirements which would be applicable to a proposed project. * * * Once the building permit has been issued, it cannot be *de facto* revoked by the simple expedient of never issuing the certificate of occupancy. That is not to say that the holder of a building permit is automatically entitled to a

> certificate of occupancy (*i.e.*, that the building official or public agency has a mandatory duty to issue one), merely because the project has been approved to the extent of obtaining a building permit. The building permit holder must first satisfy the building official, in the exercise of official discretion, that the project meets the requirements contained in the applicable statutes, codes, and regulations, and in the permit itself.

Thompson, *supra*, 18 Cal.App.4th at 57-58 (emphasis added).

Moreover, in *Thompson*, there was nothing left to determine and the court noted that the plaintiff "had fully complied with all requirements of her renovation, including the Uniform Building Code requirements, … [and Defendants'] issuance of a "Final Inspection Okay" for the premises in effect admitted and confirmed that owner had complied with all requirements. *Id.* at 52. In this case, at least one other permit was pending and there was no "Final Inspection Okay."

The *Autopsy/Post* case thus should be controlling since it is more closely similar to the case at bar. Accordingly, the City did not, as Blackwater contends, have an unqualified mandatory duty to issue the certificate of occupancy.

2. The City Did Not Use Improper Facts for its FRCP 12(b)(6) Motion

Blackwater also suggests that "the City's premise is outside of and/or inconsistent with the factual allegations of the Complaint and thus improper under the rules governing a 12(b)(6) Motion." Plaintiff's Opposition to Motion to Dismiss, p. 7, *ll.* 3-4. As the City previously noted, when evaluating a Rule 12(b)(6) motion, this Court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994).

Although a court cannot consider material outside the complaint, material properly submitted with the complaint may be considered as part of the complaint for purposes of a Rule 12(b)(6) motion. *See, e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1990); *Paulemon v. Tobin*, 30 F3d 307, 308–309 (2d Cir. 1994). When ruling on a motion to dismiss, courts may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. *Coos County Board of County Com'rs v. Kempthorne*, 531 F.3d 792, 811 (9th Cir. 2008); *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007); *MGIC Indem. Corp. v.*

Weisman, 803 F2d 500, 504 (9th Cir. 1986) (a matter that is properly the subject of judicial notice pursuant to FRE 201 may be considered along with the complaint when deciding a motion to dismiss for failure to state a claim).

The City has not referenced any facts outside of those that Blackwater presented in its complaint, referenced in its application for temporary restraining order and preliminary injunction, or those facts in which the Court is not permitted to take judicial notice. The only exception to this was to assert a defense to Blackwater's claim that it had been subject to disparate treatment prohibited by the dormant Commerce Clause, specifically referencing the Southwestern College police training program and its facility, claimed not to have been subjected to the types of review the City proposed. However, as the City's request for judicial notice indicated, the City merely requested that the Court note Southwestern College, as a state agency, was outside the scope of the City's regulatory authority.[3] Accordingly, the City did not present any facts that this Court could not legitimately consider or had not already been presented.

B. THE CITY'S RIPENESS ARGUMENT IS NOT FATALLY DEFECTIVE

Blackwater further argues that the City's ripeness argument cannot be considered because the City's motion was brought the motion under 12(b)(6) and not under 12(b)(1). Blackwater again has overlooked relevant case authority. For example, in *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir. 1989), the court held motions raising the ripeness issue are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under Rule 12(b)(6). *Id.* at 201. Accordingly, this Court is requested to treat the City's ripeness argument as having been brought under Rule 12(b)(1), and to the extent applicable, also Rule 12(b)(6).

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[3] Blackwater, for example, also requested that the Court take judicial notice of the audit report prepared at the request of the mayor, indicating that Blackwater had not misrepresented its identity contrary to municipal code requirements. It should be noted, however, that the audit report does not recommend that the certificate of occupancy should be issued. To the contrary, the audit report states:

> The Municipal Code states that no structure shall be used or occupied, and no change in the existing occupancy classification of a structure or portion of a structure shall be made until the Building Official has issued a Certificate of Occupancy approving the use for occupancy. DSD could not provide the original Certificate of Occupancy. [¶] We should also note that a permit was not obtained for the construction of the ship simulator at the facility, even though it was shown on the plans as a future structure to be built. During a site visit of the facility, we took a photograph (Attachment VIII) of the structure and asked DSD if a permit was required to construct this structure. DSD Inspection Supervisor advised that a permit is required and they have notified the contractor. [¶] **Recommendations:** [¶] 5. DSD should clarify whether a Certificate of Occupancy was issued for the building. If not, Development Services Code Enforcement should not allow any part of the building to be occupied until the certificate is issued. [¶] 6. DSD should notify Blackwater in writing that training may not be conducted in any areas for which City permits have not been issued.

Blackwater's Request for Judicial Notice in support of Opposition to Defendants' Motion to Dismiss, (Doc. 46: pp. 22-23.) (Emphasis added) (Bolded in original).

C. THE CITY'S ABSTENTION ARGUMENTS ARE PROPER

Blackwater implies, but never actually states, that the Defendants waived their right to seek abstention by this Court on *Pullman* and *Younger* grounds. To the contrary, the record proves that the Defendants did not waive their abstention arguments; moreover, the combination of the 12(b)(6) motion with the abstention arguments is procedurally proper because it comports with this Court's scheduling directive.

Blackwater notes that at the hearing on Blackwater's request for a TRO, this Court noted that the City could raise abstention in its opposition to the requested preliminary injunction. It is true that this Court initially stated at the TRO hearing, "On the abstention—I'm going to give you a briefing schedule in the written order for the preliminary injunction." (Doc. 15, p 50: 1-3).

However, Blackwater overlooks the fact that the following exchange took place shortly after the Court made this statement:

> THE COURT: Well, I set a written briefing schedule. There was no request for abstention under any State Court abstention.
>
> MR. MCGRATH: Again, remember I had 24 hours to brief. I did my best.
>
> THE COURT: Or here today. And so—
>
> MR. MCGRATH: Are you saying that we've waived the abstention issue?
>
> THE COURT: I'm saying that it was not put in writing in your written submissions.
>
> MR. MCGRATH: And we will do that on the day when—
>
> THE COURT: For a motion to dismiss, it's a 28-day schedule for a motion to dismiss.
>
> MR. MCGRATH: And that—it would be a motion to dismiss and an abstention motion at the same time.
>
> THE COURT: **You may do that.**
>
> MR. MCGRATH: **That's what we'll do.**

(Doc. 15, p. 50: 10 to 51: 2) (Bolded emphasis added).

Because Blackwater did not object to this Court's ruling that the Defendants could defer making their abstention arguments until they filed their 12(b)(6) motion, Blackwater should not be heard to complain. It would deny the Defendants' due process rights for this Court to suddenly reverse itself and find that the Defendants cannot present their abstention arguments with the 12(b)(6) motion.

1. *Pullman* Abstention

In a footnote, Blackwater argues that the *Pullman* abstention doctrine is inapplicable because the cases the Defendants rely upon—*C-Y Development Co. v. Redlands*, 703 F.2d 375 (9th Cir. 1983), *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985), and *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996) — involve sensitive land use issues. Plaintiff Blackwater notes that the *C-Y Development* case involved delicate issues of land use planning, the *Pearl Investment* case involved renovation of a building that would displace 24 residential tenants, and the *Sinclair Oil* case involved land designated as environmentally sensitive habitat.

Perhaps it is stating the obvious, but Blackwater's proposed use of its property of conducting simulated military anti-terrorism operations in an area zoned for industrial uses involves an even more sensitive land use issue than involved in those three cases. Blackwater's proposed military training uses impact not only the surrounding neighborhood, but also the entire character of the OMDD.

2. *Younger* Abstention

Blackwater has mischaracterized the Defendants' arguments regarding *Younger* abstention. Contrary to what Blackwater states, the Defendants never argued in the pending motion that this Court should abstain on *Younger* grounds because of contemplated administrative proceedings before the City Council or the Planning Commission to review the City's refusal to issue a Certificate of Occupancy. The Court's preliminary injunction precludes such administrative review.

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Rather, the Defendants base their *Younger* abstention argument entirely on the fact that after Blackwater filed its lawsuit, it applied for a permit to operate a simulator. This permit application relates back to its first permit application. The administrative proceedings governing this latest permit application have not concluded. As the City noted in this motion, "[i]t is these ongoing proceedings, including the prospect that Blackwater may apply for even more permits associated with its Otay Mesa facility, that support *Younger* abstention in this case." (Doc. 36-2: 7-9). Notably, Blackwater does not deny that it may apply for even more City permits, thus suggesting that it intends for the Court to completely abort the City's administrative review process and allow for it to proceed without any scrutiny whatsoever.

Putting aside Blackwater's strawman arguments found in its opposition to *Younger* abstention, Blackwater states, "[t]he basic problem here is that there are no ongoing state judicial proceedings." (Doc. 54: 10-11). Blackwater ignores the fact that *Younger* abstention applies to actions seeking to enjoin pending state administrative proceedings (as well as state court proceedings) if an important state interest is involved. *Baffert v. California Horse Racing Board*, 332 F.3d 613, 617-618 (9th Cir. 2003) (*citing*, *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 447 U.S. 619 (1986) and *Middlesex County Ethics Comn. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)).

The fact that it is premature for Blackwater to appeal adverse administrative findings to a state court does not insulate Blackwater from application of *Younger* to this case. "Because the Plaintiffs have an opportunity to appeal the administrative decision by the Commission in state court, the proceedings are still considered pending under the *Younger* doctrine." *Eder v. Broddrick*, 2006 U.S. Dist. LEXIS 93233 (N.D. Cal., Dec. 11, 2006) (*citing*, *United States v. Morros*, 268 F.3d 695, 710 (9th Cir. 2001)).

Thus, Blackwater's argument that there are no ongoing state judicial proceedings lacks merit and the City's abstention arguments, both under *Pullman* and *Younger* deserve consideration.

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/ / /

D. BLACKWATER DOES NOT POSSESS A SUFFICIENT PROPERTY RIGHT TO TRIGGER PROCEDURAL DUE PROCESS

Blackwater's Third Claim for Relief alleges that the City Defendants violated Blackwater's federally protected procedural due process. (Doc. 1, 20:25-28). As previously noted, a threshold requirement to a procedural due process claim is the showing of a liberty or property interest protected by the United States Constitution. *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (*citing*, *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)). However, the *Autopsy/Post* case makes clear that Blackwater has not acquired an unqualified property right under state law.

Accordingly, Blackwater's procedural due process claim must fail.

E. PLAINTIFF'S FIFTH CLAIM FOR RELIEF FAILS TO STATE A CLAIM FOR VIOLATION OF THE DORMANT COMMERCE CLAUSE

Blackwater continues to contend that it, as a foreign entity, was subject to disparate treatment compared to local entities in violation of the dormant Commerce Clause. However, Blackwater has provided no argument against those presented by the City. Blackwater attached numerous provisions of the San Diego Municipal Code, and has not identified a single provision that on its face discriminates or permits differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *See, e.g., Oregon Waste Sys., Inc. v. Or. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

Nor has Blackwater provided any argument that the so-called "Pike test," which holds that "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (*quoting*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Accordingly, Blackwater's claim for relief for violation of the Dormant Commerce Clause should be dismissed in its entirety, as it is completely without merit.

F. BLACKWATER DID NOT COMPLY WITH FILING REQUIREMENTS OF THE CALIFORNIA GOVERNMENT CLAIMS ACT

Blackwater argues that it was not required to comply with the California Government Claims Act since its state constitutional claims only seek declaratory or injunctive relief.

However, Blackwater's Complaint is ambiguous whether it would seek to recover damages assuming any ultimate determination that the City violated Blackwater's rights under the California constitution. Specifically, without distinguishing any of the claims for relief asserted, Blackwater's prayer states as follows: "4. A judgment awarding Blackwater all damages it incurred, together with interest."

The entitlement to damages for a constitutional violation is unsettled in California. In two cases, the California Supreme Court declined to recognize a constitutional tort action for damages to remedy a violation of article I, section 2(a) [California free speech clause] or article I, section 7(a) [California procedural due process clause]. *Degrassi v. Cook* (2002) 29 Cal.4th 333, 344; *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 324. However, the California Supreme Court further stated that this did not mean that the free speech clause, in general, never will support an action for money damages or there was not any basis for concluding that a damages remedy was intended to be foreclosed. *Degrassi v. Cook* , *supra*, 29 Cal.4th at 344; *Katzberg*, *supra*, 29 Cal.4th at 324.

Given that Blackwater's Complaint is ambiguous and that the issue of entitlement to damages for California constitutional violation, the City respectfully requests a determination that Blackwater is not entitled to recover damages for any violations under the California constitution asserted against the City in order to provide preclusive effect.

III. CONCLUSION

For all of the foregoing reasons, the City Defendants respectfully submit the entirety of Plaintiff's complaint should be dismissed.

Respectfully submitted,

Dated: August 4, 2008

MICHAEL J. AGUIRRE, City Attorney

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Attorneys for Defendants THE CITY OF SAN DIEGO, DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, KELLY BROUGHTON, and AFSANEH AHMADI

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No.: 08cv0926 H (WMC) **DECLARATION OF SERVICE**

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; and that I served the individuals on the service list attached hereto the following documents:

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

in the following manner:

1)___ By personally serving the individual named by personally delivering the copies to the offices of the addressee.
Time of delivery: ___________ a.m./p.m.

2)___ By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing copies (first class mail, postage prepaid) to the person served at the place where the copies were left.

3) **X** **(BY E-FILING)**. I hereby certify that on August 4, 2008, I electronically filed the above-mentioned documents with the Clerk of the Court by using CM/ECF system which will send a notice of electronic filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California to the above-mentioned e-mail addresses.

John Nadolenco, Esq. Christopher Murphy, Esq.	jnadolenco@mayerbrown.com cmurphy@mayerbrown.com
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Executed: August 4, 2008 at San Diego, California.

Maria Cook

MARIA COOK